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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,134

HENRY W. JACKSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

BRIEF FOR APPELLANT

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(Appointed by this Court)

STATEMENT OF QUESTION PRESENTED

Whether the arresting officer was entitled to arrest appellant without a warrant on narcotics charges in reliance on an informer's tip because the informer's statement was "reasonably corroborated by other matters within the officer's knowledge."

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JURISDICTIONAL STATEMENT

This appeal is from a ruling on December 21, 1964 by the district judge after a hearing on the mandate issued by this Court in Jackson v. United States, ____ U.S. App. D.C., ____ 336 F.2d 579 (1964), that the arrest of appellant without a warrant on November 15, 1962 was lawful. Jurisdiction of this Court to hear the appeal is based upon 28 U.S.C. §1291. See Jackson v. United States, supra, ____ U.S. App. D.C. at ____, 336 F.2d at 580-81 (determination by trial judge on remand will be appealable to this Court).

STATEMENT OF THE CASE

Appellant was indicted on January 7, 1963 and charged on two counts with violations of the narcotics laws (26 U.S.C. §4704(a) and 21 U.S.C. §174). Appellant filed a motion to suppress heroin on the ground that it was seized

subsequent to an illegal arrest. The district judge denied the motion after a hearing on February 1, 1963 (Mot. Tr. 22).[1] On September 16, 1963, appellant was tried by the district judge and found guilty as charged (Tr. Tr. 89-92).[2] During trial, counsel for appellant renewed (Tr. Tr. 78), and the court denied the motion to suppress (Tr. Tr. 88). Appellant was sentenced on count 1 (26 U.S.C. §4704(a)) to eight months to two years, and to seven years on count 2 (21 U.S.C. §174), the sentences to run concurrently.

Appellant's appeal from the judgment of conviction was decided by this Court on August 7, 1964, Jackson v. United States, ____ U.S. App. D.C. ____, 336 F.2d 579. This Court ruled that the trial judge erred in refusing to permit appellant to question the arresting officer about the past reliability of the informer, whose tip had caused the police to arrest appellant without a warrant. Without reversing the conviction, this Court remanded the case to the District Court with directions to hold a hearing on the issue of the informer's reliability. The opinion expressly noted that any determination by the trial judge on remand would be appealable.[3]

1/ All references to pages in the transcript of the hearing on appellant's motion to suppress are hereinafter cited as "Mot. Tr.".

2/ All references to pages in the transcript of the trial are hereinafter cited as "Tr. Tr.".

3/ Chief Judge Bazelon concurred in the court's opinion with respect to the refusal to permit questioning concerning the informer's past reliability; however, he dissented in part on the grounds that the presentation of appellant's insanity defense at trial amounted to denial of a fair trial and plain error requiring reversal under Rule 51(b), F. R. Crim. P.

At the hearing on mandate, against the advice of his attorney, appellant waived assertion of his insanity defense (Man. Tr. 2-3, 9-11, 17-18).

A hearing by the district judge on the mandate issued by this Court was conducted on December 4 and December 21, 1964.[4] After receiving testimony from the informer, Ethel Gaskins, and from the arresting officer, the judge ruled that the arrest of appellant without a warrant was lawful because based upon probable cause (Man. Tr. 66-68). This appeal followed.

SUMMARY OF TESTIMONY

Substantial differences exist in the testimony given by appellant, by the informer, Ethel Gaskins, by the arresting officer, Bello, and by his companion, Officer Ralls, concerning the circumstances surrounding appellant's arrest. Therefore, appellant's counsel deems it desirable to include in this statement of the case a summary of the relevant testimony given by each of the four individuals during the three proceedings in the District Court.[5]

TESTIMONY GIVEN BY APPELLANT DURING HEARING OF MOTION TO SUPPRESS

On November 15, 1962, at approximately 11:00 a.m. appellant was eating in the Franklin Delicatessen (Mot. Tr. 5-6, 9). Two uniformed policemen entered the delicatessen (Mot. Tr. 6). Appellant had never seen either officer before (Mot. Tr. 9). They walked up to appellant, told him to put

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[4] All references to pages in the transcript of the hearings on mandate are hereinafter cited as "Man. Tr.".

[5] The district court judge in the proceedings below credited the testimony of the police officers. Appellant's position on this appeal is that, even under the version of the facts put forth by the police, no probable cause existed for the arrest.

down his food and come outside (Mot. Tr. 6, 10). One officer grabbed appellant and then let go (Mot. Tr. 7). As they left the delicatessen, one officer preceded appellant, and the other was by his side (Mot. Tr. 10). Another customer in the delicatessen was also taken outside (Mot. Tr. 7). When they reached the sidewalk, appellant stood for a minute until he saw the police searching the other man (Mot. Tr. 11, 7). Then appellant started to walk across the street (Mot. Tr. 7, 11). He began to run to avoid being hit by a car turning on the street (Mot. Tr. 11). One officer told appellant to halt (Mot. Tr. 7, 12). The police came across the street; one took out his gun, while the other officer searched appellant (Mot. Tr. 7, 12), and took narcotics from his pocket (Mot. Tr. 8, 12). The police did not at any time show appellant a search warrant (Mot. Tr. 8). At the time of his arrest, appellant was wearing a tan, waist-length jacket, green corduroy pants, and a brown beret (Mot. Tr. 8-9).

TESTIMONY OF ETHEL GASKINS AT TRIAL AND HEARING ON MANDATE

On November 15, 1962, about 12:30 p.m., Ethel Gaskins was hailed by Officer Bello who was seated in a scout car with Officer Ralls at 14th and T Streets (Tr. Tr. 70; Man. Tr. 42). The officer asked Miss Gaskins where she was going (Tr. Tr. 70; Man. Tr. 43). She replied she was going to a store to wait for a friend (Tr. Tr. 70-71; Man. Tr. 43). She answered in the negative to the officer's questions as to whether she had in her possession, or had been using narcotics (Tr. Tr. 71; Man. Tr. 43). The witness had seen the appellant go in the Franklin Delicatessen prior to talking with the officers (Tr. Tr. 72); however, she denied informing the police that appellant

had narcotics in his possession (Tr. Tr. 71, 73; Man. Tr. 45, 51, 61). She did not know that appellant had narcotics in his possession on November 15, 1962 (Man. Tr. 47-48). Similarly, Miss Gaskins testified she did not give the police a description of how appellant was dressed (Tr. Tr. 73).

Prior to November 15, 1962, the witness remembered talking to Officer Bello approximately three times (Man. Tr. 46). During the period September 1961 to November 1962, the witness was engaged in prostitution (Man. Tr. 43-44), and attempted to avoid Officer Bello and all policemen (Man. Tr. 44). In this period, she did not volunteer any information to Officer Bello of narcotics violations or of any illegal activity (Man. Tr. 45-47). The witness had no conversations with Officer Bello about a person called Mary Sales or about an establishment known as 1352 Swann Street (Man. Tr. 44).

Miss Gaskins testified she had known appellant since July or August 1962 (Tr. Tr. 72); he was a friend of her family's, not her boy friend (Man. Tr. 48, 61), and she denied telling Officer Bello that appellant was her boy friend (Man. Tr. 61).

The witness had been convicted of soliciting in 1957, 1958, and 1962 (Tr. Tr. 73-74; Man. Tr. 50-51). In 1963, she was imprisoned for possession of narcotics (Tr. Tr. 69, 70, 74; Man. Tr. 51).

TESTIMONY OF OFFICER BELLO AT HEARING OF MOTION TO SUPPRESS, AT TRIAL, AND AT HEARING ON MANDATE

On November 15, 1962, at approximately 1:00 p.m., Officer Bello was

patrolling by radio unit scout car with Officer Ralls in the 1900 block of 14th Street, N.W. (Mot. Tr. 13-14). Ethel Gaskins approached the officers while they were speaking to a third person (Tr. Tr. 81-82; Man. Tr. 24). She told them that a man then in the Franklin Delicatessen had heroin in his possession (Mot. Tr. 16; Tr. Tr. 81; Man. Tr. 24). She described the man physically as a negro male, five feet nine inches tall, twenty-five to twenty-seven years old, wearing a brown cap, tan zipper waist-length jacket, and green corduroy trousers (Mot. Tr. 16). At the trial and hearing on mandate, Officer Bello testified that Miss Gaskins stated that she was informing on this man, her boy friend, because he wouldn't share any of the narcotics with her (Tr. Tr. 81; Man. Tr. 56, 58). (Previously, however, at the hearing on the motion to suppress, Officer Bello had flatly denied that Gaskins had told him that she was appellant's girl friend or had given him any explanation for informing on appellant (Mot. Tr. 18)). On this information alone, the officers entered the delicatessen where they saw a man who fitted the physical description given by Miss Gaskins (Mot. Tr. 16; Tr. Tr. 27; Man. Tr. 25-26). Officer Bello had not known the man previously (Mot. Tr. 16; Tr. Tr. 54; Man. Tr. 25). Bello immediately asked the appellant and another Negro male who was standing hear him to step outside because the officer wanted to talk to them (Tr. Tr. 28, 37). Originally, Officer Bello testified that the other man resembled appellant and the policemen requested him to come outside because they wanted to be sure of their identification (Mot. Tr. 19). Later, at trial, Bello changed this testimony and denied that identification was the purpose for bringing the other man

outside (Tr. Tr. 39).

Officer Bello gave conflicting versions of the events that transpired after the four men reached the sidewalk in front of the delicatessen. First, the officer testified that as the other man was being searched and appellant questioned routinely, appellant ran away from the officers (Mot. Tr. 19-20). Later, Bello testified that appellant began to run immediately upon reaching the sidewalk (Tr. Tr. 28), and that no search was made of the other man (Tr. Tr. 41-42). Appellant was apprehended across the street and narcotics were recovered from his person (Mot. Tr. 16; Tr. Tr. 28).

At the hearing on mandate, Officer Bello testified that subsequent to his assignment in the 13th Precinct in October 1961 until the arrest of Jackson on November 15, 1962, Ethel Gaskins had furnished reliable information concerning prostitutes and illegal establishments which led to arrests and convictions for various vice violations (Man. Tr. 23). On three, four, or five occasions, Gaskins had volunteered information concerning the criminal activities of other people (Man. Tr. 33-35). Bello could not recall whether any of these people were narcotics offenders (Man. Tr. 39). He could recall only that the information must have been supplied between October 1961 and November 1962. Bello did not keep written notes of the furnishing of such information by Gaskins (Man. Tr. 29), and he could not recall the approximate month in which any such incident occurred (Man. Tr. 29, 31-32, 34). The only specific information recalled by Officer Bello was that Gaskins had supplied information concerning illegal establishments at 1352 Swann

Street[6/] (Man. Tr. 22, 28), 1342 T Street, N. W. (Man. Tr. 22, 33), and one Mary Sales, arrested for vagrancy (Man. Tr. 22, 30-31, 33, 36-38). Bello admitted that the infamous establishment at 1352 Swann Street was well known to a lot of people and Officer Bello had an idea about it even before Gaskins mentioned it (Man. Tr. 28). Mary Sales' arrest on vagrancy charges was based on the observations of Bello and other officers, coupled with Gaskins' information (Man. Tr. 37-38). Officer Bello knew Gaskins was a prostitute (Man. Tr. 35), and had spent time in jail (Man. Tr. 39). To the best of his knowledge, Gaskins was not a paid informer (Man. Tr. 40).

TESTIMONY OF OFFICER RALLS AT TRIAL

On November 15, 1962, Officer Ralls was standing with Officer Bello on the sidewalk a little south of the Franklin Delicatessen when Miss Gaskins approached (Tr. Tr. 84). She told the officers that a man inside the Franklin Delicatessen had narcotics in his possession (Tr. Tr. 84), and described the man as colored, about twenty-five years old, five feet eleven and one-half inches, weighing about 159 pounds, medium build, and wearing a tan, waist-length jacket with a zipper, green corduroy pants, and a brown beret cap (Tr. Tr. 84-85). Miss Gaskins stated she was informing on the man because he would not split the narcotics with her (Tr. Tr. 85). Officer Ralls testified further that he had previously known Miss Gaskins, and that

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6/ According to Polk's Washington District of Columbia City Directory 1964, Swann Street, N. W. begins with a 1400 block. At the hearing on mandate, Ethel Gaskins testified that there is no 1352 Swann Street (Man. Tr. 44).

he had received information in regard to other cases from her which had always proved reliable (Tr. Tr. 85).

CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT, THE CONSTITUTION OF THE UNITED STATES OF AMERICA

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF POINTS

At the hearing on the mandate issued by this Court, the district judge erred in ruling that the arrest of appellant without a warrant was lawful because based on probable cause.

SUMMARY OF ARGUMENT

A. In determining the sufficiency of probable cause to arrest on a narcotics violation where the officer acted in reliance upon an informer's tip, both the Supreme Court and this Court have required that the informant's report be "reasonably corroborated by other matters within the officer's knowledge." Jones v. United States, 362 U.S. 257, 269 (1960) (citing Draper v. United States, 358 U.S. 307 (1958)). See Schoeneman v. United States, 115 U.S. App. D.C. 110, 115, 317 F.2d 173, 178 (1963); Brandon v. United States, 106 U.S. App. D.C. 118, 123, 270 F.2d 311, 316 (1959); Jones v. United States, 105 U.S. App. D.C. 326, 266 F.2d 924, 928-29 (1959)(statement by Bazelon, C.J.)

B. The courts have weighed a number of factors in deciding whether the arresting officer's personal knowledge provided reasonable corroboration of the informer's report. These factors are: (1) whether the arresting officer had previous knowledge that the suspect was an addict or was involved in the narcotics traffic; (2) whether the informant's story also reached the officer through other sources of information; (3) whether the informant was a paid employee of the narcotics authorities; (4) whether the arresting officer placed the suspect under surveillance prior to arrest and observed whether his suspicious behavior supported the tip; (5) whether the arresting officer obtained information from the suspect by personally questioning him prior to the arrest; (6) whether the informant's report was comprised of a large number of "facets" which were personally verified by the officer prior to arrest; (7) whether the arresting officer knew that the informer had given reliable information in the past.

Because the factual circumstances surrounding appellant's arrest show a lack of nearly all the foregoing factors, this Court should hold that the informer's tip was not reasonably corroborated by matters within the arresting officer's personal knowledge. The record discloses that in the instant case, the arresting officer did not know appellant prior to the arrest, and had no information in addition to the informer's report that a crime had been or was being committed and that appellant was the actor. The arresting officer made no effort to corroborate the report by questioning the appellant or by observance of his behavior, but, rather, arrested appellant on sight very shortly after receiving the informer's tip. The

statement by the informant upon which the arresting officer relied was not a detailed, "multi-faceted" report such as was given by the informer and personally verified in Draper v. United States, 358 U.S. 307 (1959), and in Brandon v. United States, 106 U.S. App. D.C. 118, 270 F.2d 311 (1959).

C. The past reliability of the informer is merely one factor for the court to weigh in determining the existence of reasonable corroboration. Nevertheless, the testimony of the arresting officer as to his past contacts with the informer failed to provide the strong showing of reliability that should be required where the arrest was made solely on the basis of the informer's tip, which was not reasonably corroborated by other information within the arresting officer's personal knowledge.

D. The Supreme Court and this Court have often cautioned against the dangers inherent in judicial approval of doubtful applications of the probable cause doctrine.

ARGUMENT

I. BECAUSE THE INFORMER'S STATEMENT WAS NOT "REASONABLY CORROBORATED BY OTHER MATTERS WITHIN THE ARRESTING OFFICERS KNOWLEDGE", THE DISTRICT JUDGE ERRED IN RULING THAT PROBABLE CAUSE EXISTED TO ARREST APPELLANT WITHOUT A WARRANT.

The issue posed by the instant appeal is whether the information concerning appellant's possession of narcotics given to Officers Bello and Ralls by Ethel Gaskins was sufficient to constitute "probable cause" for the officers' arrest of appellant without a warrant because the informer's statement was "reasonably corroborated by other matters within the officer's knowledge."[7/]

In the present case, probable cause must be determined no later than the point in time when appellant was escorted by the officers from the delicatessen, i.e., when the arrest occurred. This Court stated in its opinion on appellant's first appeal that: "As in Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961), we can say that if appellant was not arrested when he was asked to step outside, he was certainly under arrest by the time he was escorted outside and questioned by the police." Jackson v. United States, ____ U.S. App. D.C. ____, 336 F.2d 579, 580 (1964). If the officers had no "probable cause" to arrest appellant without a warrant,

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7/ Jones v. United States, 362 U.S. 257, 269 (1960) (citing Draper v. United States, 358 U.S. 307 (1959)); Schoeneman v. United States, 115 U.S. App. D.C. 110, 115, 317 F.2d 173, 178 (1963); Jones v. United States, 105 U.S. App. D.C. 326, 266 F.2d 924, 928-29 (1959) (statement by Bazelon, C.J.). See Paris v. United States, 116 U.S. App. D.C. 112, 321 F.2d 378 (1963); Brandon v. United States, 106 U.S. App. D.C. 118, 123, 270 F.2d 311, 316 (1959).

clearly, both the search of appellant's person made incidental to the unlawful arrest and the seizure of the narcotics was illegal, and the motions to suppress were erroneously overruled prior to, and during the trial. See Henry v. United States, 361 U.S. 98, 102 (1959) ("if an arrest without a warrant is to support an incidental search it must be made with probable cause"); Draper v. United States, 358 U.S. 307, 310-11 (1959); United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Contee v. United States, 94 U.S. App. D.C. 297, 299, 215 F.2d 324, 327 (1954). If appellant's arrest was illegal, the taint was not removed by the fact that narcotics were in fact subsequently recovered from his person during an unauthorized search. The Supreme Court on several occasions has cautioned that: "an arrest is not justified by what the subsequent search discloses." Henry v. United States, supra, 361 U.S. at 103. See Johnson v. United States, 333 U.S. 10, 16-17 (1948); Jones v. United States, supra, 105 U.S. App. D.C. at 331-32, 266 F.2d at 929-930 ("the validity of an arrest cannot be proven by its fruits").

A. IN NARCOTICS CASES WHERE THE POLICE HAVE RELIED ON AN INFORMER'S REPORT TO ARREST WITHOUT A WARRANT, THE COURTS HAVE REFINED THE GENERAL STANDARD FOR MEASURING PROBABLE CAUSE BY REQUIRING THAT THE INFORMER'S LEAD BE "REASONABLY CORROBORATED BY OTHER MATTERS WITHIN THE OFFICER'S KNOWLEDGE."

In attempting to define the amount of information necessary to satisfy the constitutional standard [8/] of "probable cause" for an arrest without a warrant,

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8/ See Henry v. United States, supra, 361 U.S. at 100 (1959). For learned discussion of the historical development of the probable cause requirement, see generally Id at 100-101. Draper v. United States, supra, 358 U.S. at 315-320 (Douglas, J., dissenting opinion).

the Supreme Court has stated generally that:

> "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, supra, 358 U.S. at 313, quoting Carroll v. United States, 267 U.S. 132, 162 (1925). Accord, Wong Sun v. United States, 371 U.S. 471, 479 (1963); Henry v. United States, 361 U.S. at 102; Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

Similarly, in Bell v. United States, 102 U.S. App. D.C. 383, 388, 254 F.2d 82, 87, cert. denied, 358 U.S. (1958), Judge Prettyman wrote:

> "The sum total of the reams that have been written on the subject is that a peace officer may arrest without a warrant when he has reasonable grounds, in light of the circumstances of the moment as viewed through his eyes, for belief that a felony has been committed and that the person before him committed it."

Appellant contends that the general rule for measuring probable cause has, in narcotics cases, been subject to further judicial circumscription where the police have relied on as informer's report to arrest without a warrant. Thus, in determining the sufficiency of probable cause to arrest on a narcotics violation where the officer acted upon an informer's word, the Supreme Court has stated that reliance may be placed upon such information "so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." Jones v. United States, 362 U.S. at 269 (1960). This Court has expressly recognized the "reasonable corroboration" requirement. Schoeneman v. United States, supra, 115 U.S. App. D.C. at 115, 317 F.2d at 178 (bribery and converting Government property); Jones v. United States, supra, 266 F.2d at 928-29. See Paris v. United States, supra; Brandon v. United States, supra, 106 U.S. App. D.C. at 123, 270 F.2d at 316. Judge Bazelon has discussed at some length why the reliability of

the narcotics informer is "obviously suspect", and why the law has wisely limited the use of such information by requiring "some corroboration by facts within the arresting officer's own knowledge." Jones v. United States, supra, 266 F.2d at 928-29.

B. THE FACTUAL CIRCUMSTANCES SURROUNDING APPELLANT'S ARREST DISCLOSE A LACK OF MOST OF THE FACTORS WHICH THE COURTS HAVE WEIGHED IN DETERMINING WHETHER THE ARRESTING OFFICER POSSESSED THE NECESSARY CORROBORATING KNOWLEDGE.

A review of the applicable authorities reveals that in judging whether the reasonable corroboration principle has been satisfied in the particular narcotics case where the arrest without a warrant was made in reliance on an informer's tip, the courts have indicated that the necessary corroborating knowledge of the arresting officer might be constituted by a number of different facts. It is appellant's contention that when measured against these factors, the facts and circumstances of the instant case should be considered as insufficient to establish that probable cause existed to justify the arrest of appellant.

In Jones v. United States, 362 U.S. 257 (1960), the Supreme Court was faced with the issue of deciding whether an affidavit by a federal narcotics officer constituted sufficient evidence of probable cause to justify issuance of a search warrant. The affidavit recited that: (1) the agent had been given a report by an informant that petitioner and another person were involved in illicit narcotics traffic and kept a supply of heroin on hand in the apartment; (2) that the informant claimed to have purchased

narcotics from petitioner and another "on many occasions", the last of which had been the day before the warrant was applied for; (3) the informant had previously given accurate information; (4) the informant's story regarding petitioner had been given the narcotics squad by "other sources of information"; and (5) the petitioner and the other person implicated by the informant were known to the police as admitted users of narcotics.

In concluding that the informant's statement had been reasonably corroborated, the Court stressed heavily that the existence of the foregoing five factors in the affidavit had reduced the chances of a false denunciation by the informer:

> "[W]e may assume that [the agent] had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but [the agent] swore to a basis for accepting the informant's story. The informant had previously given accurate information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history." [Emphasis added.] (362 U.S. at 271)

Even crediting the testimony of Officer Bello, the facts of the present case fall far short of the several factors which were cumulatively equated in Jones with probable cause. For example, Ethel Gaskins' information about appellant was not corroborated by any other sources of information -- appellant was arrested solely on the basis of the informer's accusation. Nor was appellant "a known user of narcotics" -- quite to the contrary, the

arresting officer had not even known appellant priot to the arrest (Mot. Tr. 16; Man. Tr. 25). As opposed to the positive statement by the informant in Jones that the suspect was involved in the narcotics traffic, kept a ready supply of heroin in his apartment, and that the informer had purchased narcotics from the suspect on numerous occasions, including the day the information was given, the arresting officer testified at the hearing on motion to suppress that Gaskins had simply stated that a negro male, then seated in the Franklin Delicatessen, with certain physical characteristics and clothing had narcotics on his person (Mot. Tr. 16). Furthermore, Officer Bello flatly denied that Gaskins had explained her past contact with appellant or had given the motive of revenge for her accusation (Mot. Tr. 18).

The corroborating effect produced by the suspect's known previous involvement with narcotics was stressed also by this Court in Jones v. United States, 106 U.S. App. D.C. 228, 271 F.2d 494 (1959). In upholding the presence of probable cause, the Court noted:

> "[A] series of related elements were involved in [the officer's] evaluation of probable cause for arrest. The first was, as the record shows, that appellant was then under investigation and surveillance for suspected narcotics traffic; the second element, also plain in this record, was that appellant had a long criminal history, including two prior narcotics convictions." 106 U.S. App. D.C. at 230, 271 F.2d at 496.

Similarly, in Brandon v. United States, supra, 106 U.S. App. D.C. at 122, 270 F.2d at 315, after receiving the informant's story the officer placed the suspect under personal observation and recognized him as one "involved in the narcotics traffic." See Schoeneman v. United States, supra, where in

holding that the hearsay information had not been corroborated, the Court observed that defendant was not alleged to be a known participant in the criminal activity with which he was charged. 115 U.S. App. D.C. at 113-14 n.8; 317 F.2d at 176-77 n.8.

Draper v. United States, 358 U.S. 307 (1959) is another narcotics case where the presence of probable cause to arrest without a warrant based on an informer's tip was held to exist and where several factors were present which are not in the instant record. The informant had been engaged as a paid "special employee" of the Bureau of Narcotics for six months,[9/] and from time to time had given reliable information to the agent regarding violations of the narcotics laws. The importance of the informant's status as a paid employee of the Narcotics Bureau was emphasized by the Court, pages 312-313:

> "The information given to narcotic agent Marsh by 'special employee' Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it." [Emphasis added.]

Far from being a "special employee", Ethel Gaskins was not even a paid informer (Man. Tr. 40). She was known by the arresting officer to be a prostitute who had served time in jail (Man. Tr. 35, 39). Furthermore, the testimony of Bello tended to show that Gaskins' past information had not before related to narcotics violations (Man. Tr. 22-23, 28, 30-31, 33-35, 36-39).

9/ The special employee died four days after petitioner's arrest and did not testify at the hearing on the motion to suppress. 358 U.S. at 310. The Court observed that "the evidence offered at the hearing on the motion to suppress was not substantially disputed." Id at 309.

In Draper, the Court went on to observe that in pursuing the informer's story, the agent had "personally verified every facet of the information given him except whether the suspect had narcotics on his person. It should be stressed that the informer's report had been very detailed and composed of a number of "facets." On September 3, 1956, the "special employee" had called the agent and told him that the petitioner had just moved to a stated address in the city and was peddling narcotics to several addicts there. Four days later, the informer told the agent that petitioner (1) had gone to Chicago the day before by train, (2) was going to bring back three ounces of heroin, (3) would return to Denver by train either the next morning, the 8th, or the morning following. The informer also (4) gave a detailed physical description of petitioner, and (5) of his clothing, and stated (6) he would be carrying a tan zipper bag, and (7) habitually walked very fast. On the morning of the 9th, the agent "saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that [the informant] had described, alight from one of the very trains from the very place stated by [the informant] and start to walk at a 'fast' pace toward the station exit." (358 U.S. at 313).

In the instant case, the "facets" in the informer's report were slight as compared with the very detailed information given by the "special employee" to the experienced federal narcotics agent over a four day period and subsequently verified by the agent's personal observation. After Gaskins reported that a negro male of a certain physical description, wearing specified clothing, was seated in a store a short distance away with narcotics in his

possession, Officers Bello and Ralls immediately entered the store and, seeing a man fitting the description, [10] at once approached him and requested that he and another man accompany the officers outside, thus effecting the arrest.

In Jones v. United States, supra, 105 U.S. App. D.C. at 331, 266 F.2d at 929, Judge Bazelon suggested that corroboration of the informer's report "may be obtained by placing the suspect under surveillance and observing whether his behavior -- e.g., making contact with persons known to be in the trade, or surreptitious passing of a package -- tends to support the informer's story." [11] The facts in Brandon v. United States, supra, are illustrative of a case where the arresting officer did in fact place a narcotics suspect under surveillance in order to observe whether his behavior corroborated the informer's report which greatly exceeded Ethel Gaskins' story in detail.

In Brandon, an officer attached to the narcotics squad for several years was telephoned by a female narcotics addict who stated that two men were going to New York that night to bring back narcotics and that the officer would be informed of their destination as soon as they returned. The woman had been a reliable informant for over a year; she had been arrested by the officer a number of times, and was known by him through investigation to be associated with the two suspects and with the narcotics traffic. The following day the officer received another call from the woman, stating that she had

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[10] Despite the police testimony that Gaskins supplied a description of the suspect's physical characteristics and clothing, the arresting officer testified that another man was asked to accompany appellant outside the store at the time of the arrest because: "We wanted to be sure of our identification. They resembled each other (Mot. Tr. 18)."

[11] Cf. Jones v. United States, supra, 106 U.S. App. D.C. at 230, 271 F.2d at 496, where this Court noted that one of the "series of related elements" involved in the arresting officer's evaluation of probable cause was "that appellant was then under investigation and surveillance for suspected narcotics traffic."

been to room No. 7 at a certain address and that the two suspects had bought narcotics there. She stated further that one of the men would drive to the given address that day in a 1948 Plymouth to prepare the narcotics for sale. Even though it was Sunday, the officer then contacted the Commissioner and made an appointment to meet later at his office. In the interim, the officer drove to the given address to verify the information. He saw appellant, whom he recognized as one involved in the narcotics traffic, drive up in a 1948 Plymouth and enter room No. 7. He then proceeded to the Commissioner's office where a search warrant was issued based upon the officer's attestation to the foregoing. This Court concluded that:

> "The facts and circumstances within the officer's personal knowledge coupled with those of which he had reasonably trustworthy information fully warranted him as a man of reasonable caution in believing that an offense against the narcotics laws had been and was being committed . . . ." [Emphasis added.] 106 U.S. App. D.C. at 123, 270 F.2d at 316.[12]

The facts and circumstances attending the actions of the arresting officer in the present case differ markedly from the type of behavior suggested

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12/ In Brandon, this Court also stated that: "Circumstances known to and inferences to be drawn by the officer such as are described by Mr. Justice Douglas [dissenting in Draper v. United States, supra] predicated the officer's fully founded and reasonable belief." 106 U.S. App. D.C. at 123, 271 F.2d at 316. The following language by Justice Douglas had been quoted earlier in the Brandon opinion:

> "[Reasonable grounds for the belief by an officer that a crime is being committed] could be inferences from suspicious acts, e.g., consort with known peddlers, the surreptitious passing of a package, an intercepted message suggesting criminal activities, or any number of such events coming to the knowledge of the officer . . . . But, if he takes the law into his own hands and does not seek the protection of a warrant, he must act on some evidence known to him." Draper v. United States, supra, 358 U.S. at 323.

by Judge Bazelon in Jones and commended by the Court in Brandon. Upon receiving from an informer, who, apparently, had never before given information concerning narcotics violations, a tip concerning the possession of heroin by an individual unknown to the officers, the police did not attempt to place the suspect under surveillance and observe whether his behavior corroborated the informant's story. Rather, the officers proceeded directly to the Franklin Delicatessen where they saw appellant finishing a bottle of soda pop. (Tr. Tr. 39). Without making any attempt to question appellant, or to observe his reaction to a mention of Gaskins' report or to a request for permission to search appellant's person,[13/] the officers immediately requested appellant to accompany them outside where, at the latest, the arrest occurred.

C. THE PAST RELIABILITY OF THE INFORMER IS MERELY ONE OF THE ELEMENTS THAT SHOULD BE CONSIDERED IN REVIEWING THE ISSUE OF REASONABLE CORROBORATION; NEVERTHELESS, THE TESTIMONY OF THE ARRESTING OFFICER FAILED TO ESTABLISH THE STRONG SHOWING OF RELIABILITY WHICH SHOULD BE REQUIRED WHEN THE ARRESTING OFFICER HAS NO PERSONAL KNOWLEDGE OF THE SUSPECT OR OF THE COMMISSION OF A CRIME AND ARRESTS SOLELY ON THE

13/ In Paris v. United States, 116 U.S. App. D.C. 112, 321 F.2d 378 (1963), the arresting officer had received detailed and convincing evidence from the victim of a robbery as to the identity of the actor. Nevertheless, the officer confronted the accused with the report and several other pertinent questions, observed his suspicious demeanor and a large sum of money on his person, and then made his decision to arrest. This Court concluded that the information given to the officer, including the fact that the victim and suspect were co-workers, "coupled with the officer's observation and other information he learned from both [the informer] and appellant, gave him as a prudent officer cause to believe both that the purported offense had taken place and that appellant was the one who committed it." [Emphasis added.] 116 U.S. App. D.C. at 114, 321 F.2d at 380.

BASIS OF THE INFORMER'S LEAD, WITHOUT MAKING ANY EFFORT AT CORROBORATION THROUGH OBSERVATION OR QUESTIONING OF THE SUSPECT.

Appellant contends that the foregoing authorities, especially the decisions of the Supreme Court in Jones and Draper and this Court's opinion in Brandon, illustrate that past reliability has been but one of a series of elements that has been considered by the courts in reviewing the issue of whether the narcotics informer's story has been "reasonably corroborated by other matters within the officer's knowledge." Jones v. United States, supra, 362 U.S. at 269. Appellant urges that the instant record is too devoid of these other corroborating factors to support the existence of probable cause. Nevertheless, when, as in the present case, the arresting officer has no previous knowledge of the accused, no information aside from the informer's report that a crime has been or is being committed or that the accused is the guilty party, and when the arresting officer makes no effort to corroborate the report by questioning of the suspect or by observance of his behavior, but, rather, arrests on sight very shortly after receiving the informer's lead, then an extremely strong showing of the informer's reliability should be required.[14/] Officer Bello's testimony at the hearing on remand concerning his previous contact with Gaskins provided little concrete support for her reliability. Bello testified that some time between the period October 1961

14/ "When deprivation of liberty by arrest is justified by a combination of an informer's report and a policeman's own observations, the less the policeman is required to observe, the more significant becomes the informer's report . . . . The requirement that the informer be reliable stands as the only effective legal safeguard against false denunciations by irresponsible individuals who may be motivated by self-interest, spite, or even paranoia." Jones v. United States, supra, 105 U.S. App. D.C. at 331, 266 F.2d at 929 (Bazelon, J .).

and November 1962, Gaskins had on three, four, or five occasions furnished reliable information concerning various criminal activities. (Man. Tr. 23, 33-35, 39). Bello did not keep written notes of such reports nor could he recall the approximate month in which any such leads were given (Man. Tr. 29, 31-32, 34). When pressed for some specifics of Gaskins' past reliability, Officer Bello mentioned three separate incidents. (Man. Tr. 22, 28, 30-31, 33, 36-38). His testimony, however, indicated that in one such instance, the information conveyed by Gaskins had been known previously by Bello, (Man. Tr. 28) and that in another, Bello corroborated Gaskins' lead by personal observation (Man. Tr. 37-38). Bello knew that Gaskins was a prostitute who had been imprisoned (Man. Tr. 35, 39); she apparently was not a paid informer (Man. Tr. 40).

D. THE SUPREME COURT AND THIS COURT HAVE OFTEN STRESSED EMPHATICALLY THAT THE JUDICIARY MUST NOT RELAX ITS GUARD AGAINST DOUBTFUL APPLICATIONS OF THE DOCTRINE OF PROBABLE CAUSE.

The Supreme Court and this Court have in many opinions cautioned that the real dangers of official abuse of the power to arrest constrains the judiciary to scrutinize rigorously each claim of "probable cause" and to guard against doubtful applications of the doctrine. For example, in Jones v. United States, supra, 362 U.S. at 270-71, Justice Frankfurter, writing for the Court, stated: "In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may govern whether liberty or privacy is to be

invaded." [Emphasis added.] In an earlier decision, Justice Jackson, for the Court, in the following language rejected a plea by the Government of "the immediate need to search" some suspects traveling in a car:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. United States v. Di Re, 332 U.S. 581, 595 (1948).

In the Supreme Court's most recent leading decision on probable cause, Wong Sun v. United States, supra, 371 U.S. at 479. Justice Brennan wrote: "The history of the use, and not infrequent abuse, of the power to arrest cautions that relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice."[15/]

CONCLUSION

Under the authorities discussed in this brief, the requirement that the informer's story be "reasonably corroborated by other matters within the [arresting] officer's knowledge" should not be held to have been satisfied by the facts and circumstances existing at the time of appellant's arrest. Hence, no probable cause to arrest without a warrant existed, and the incidental search of appellant's person and the subsequent seizure of the narcotics were illegal. Therefore, the denial of appellant's motions to suppress prior to, and during the trial constituted clear error.

15/ Accord, Justice Douglas' dissent in Draper v. United States, 358 U.S. 307, 314 (1959); Schoeneman v. United States, supra, 115 U.S. App. D.C. at 115 n.14, 317 F.2d at 178 n.14; Jones v. United States, supra, 105 U.S. App. D.C. at 329-32, 266 F.2d at 927-30; Wrightson v. United States, 95 U.S. App. D.C. 390, 222 F.2d 556 (1955).

For the foregoing reasons, the judgment of conviction below should be reversed.

Respectfully submitted,

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